

Message Text

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ACTION L-02

INFO OCT-01 ARA-06 ISO-00 EB-07 COME-00 TRSE-00 AID-05

OPIC-03 OMB-01 CIAE-00 INR-07 NSAE-00 /032 W

----- 099762

R 272243Z FEB 75

FM AMEMBASSY SAN JOSE

TO SECSTATE WASHDC 9489

LIMITED OFFICIAL USE SAN JOSE 0851

E.O. 11652: NA

TAGS: EINY CS

SUBJECT: CALVO CLAUSE AND RELATED PROVISIONS

REF: STATE 024007

1. A RECOGNIZED LOCAL AUTHORITY ON LAWS AFFECTING FOREIGN INVESTMENT IN COSTA RICA, HUMBERTO PACHECO, AUTHOR OF FOREIGN INVESTMENT IN COSTA RICA: THE LEGAL FRAMEWORK WHICH WAS PUBLISHED IN VOLUME III NO. 2 OF LAWYER OF THE AMERICAS, ASSERTS THAT CALVO CLAUSES DO NOT EXIST IN THE CONSTITUTION, COMMERCIAL CODE, OR IN ANY OF THE STATUTES OF COSTA RICA. ANOTHER LAWYER, HOWEVER, HAS POINTED OUT AN ARTICLE IN THE COMMERCIAL CODE THAT, WHILE IT DOES NOT RESTRICT THE RIGHT OF FOREIGN INVESTORS TO SEEK HOHL GOVERNMENT ASSISTANCE IN CASE OF INVESTMENT DESPUTES, DOES REQUIRE THE REPRESENTATIVE OR LOCAL BRANCH OF A FOREIGN FIRM TO SUBMIT ITSELF TO THE EXCLUSIVE JURISDICTION OF THE COSTA RICAN COURTS. THE RELEVANT ARTICLE, WHICH IS ARTICLE 226 C OF THE COMMERCIAL CODE, REQUIRES THAT FOREIGN COMPANIES WHICH HAVE OR WISH TO ESTABLISH BRANCHES IN COSTA RICA APPOINT A GENERAL AGENT AND, IN THE DESCRIPTION OF HIS POWERS, "STATE EXPRESSLY THAT THE REPRESENTATIVE, AND THE BRANCH, ARE SUBJECT TO THE LAWS AND COURTS IN COSTA RICA WITH REGARD TO ALL ACTS IN CONTRACTS THAT THEY CELEBRATE OR WILL CELEBRATE IN THE COUNTRY AND THAT THEY EXPRESSLY RENOUNCE THE LAWS OF THEIR PLACE OF COMICLE."

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2. ARTICLE 19 OF THE CONSTITUTION WOULD APPEAR TO HAVE RELE-

VANCE BOTH TO THE QUESTIONS CONCERNING "CALVO CLAUSES" RAISED IN PARAGRAPH 1 OF REFTTEL AND ALSO THE DEPARTMENT'S QUESTION WITH RESPECT TO "NATIONAL TREATMENT" IN PARAGRAPH 2 OF REFTTEL. ARTICLE 19 READS "FOREIGNERS HAVE THE SAME DUTIES AND INDIVIDUAL AND SOCIAL RIGHTS AS COKTA RICANS, WITH THE EXCEPTIONS AND LIMITATIONS ESTABLISHED BY THIS CONSITUTION AND THE LAWS. THEY CANNOT INTERVENE IN POLITICAL AFFAIRS OF THE COUNTRY, AND ARE SUBJECT TO THE JURISDICTION OF COURTS OF JUSTICE AND OF THE AUTHORITIES OF THE REPUBLIC, WITHOUT BEING ABLE TO RESORT TO DIPLOMATIC INTERVENTION EXCEPT AS PROVIDED IN INTERNATIONAL AGREEMENTS."

3. THE PRINCIPLES OF THE CALVO CLAUSE MAY ALSO BECOME APPLICABLE IN COSTA RICA THROUGH INDUSTRIAL CONTRACTS CELEBRATED WITH THE GOVERNMENT OF COSTA RICA BY FOREIGN INVESTORS. A QUICK SURVEY OF SEVERAL AMERICAN FIRMS FOUND ONLY ONE FIRM WHICH HAS ANY SUCH CLAUSE IN ITS INDUSTRIAL CONTRACT. THIS FIRM, ALCOA, HAS A CLAUSE IN ITS INDUSTRIAL CONTRACT BY WHICH THE COMPANY RELINQUISHED ITS RIGHTS TO SEEK U.S. DIPLOMATIC ASSISTANCE IN SETTLEMENT OF DISPUTES AND PROVIDING FOR THE EXCLUSIVE JURISDICTION OF COSTA RICAN COURTS. THE EMBASSY BELIEVES THAT CONTRACTS OF THIS TYPE ARE IN THE MINORITY IN COSTA RICA AT PRESENT, ALTHOUGH CALVO TYPE CLAUSES MAY BECOME MORE PREVALENT IN FUTURE CONTRACTS AND IN RENEWAL OF EXISTING CONTRACTS.

4. A SYSTEM OF ARBITRATION FOR THE SETTLEMENT OF DISPUTES IS PROVIDED FOR IN THE CONSTITUTION, CIVIL CODE AND THE CIVIL PROCEDURE CODE OF COSTA RICA, ACCORDING TO PACHECO. THE SYSTEM PROVIDES FOR APPOINTMENT OF A GROUP OF ARBITRATORS, MUTUALLY AGREED UPON BY BOTH SIDES. THE DECISION OF THE ARBITRATORS IS GUARANTEED TO BE LEGAL AND VALID. PACHECO STATES THAT THIRD PARTY ARBITRATION IN FOREIGN COURTS IS NOT PRECLUDED IF PREVIOUSLY PROVIDED FOR IN DISPUTE RESOLUTIONS PROCEDURES.

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Message Attributes

Automatic Decaptioning: X
Capture Date: 01 JAN 1994
Channel Indicators: n/a
Current Classification: UNCLASSIFIED
Concepts: INVESTMENT LAW, FOREIGN INVESTMENTS
Control Number: n/a
Copy: SINGLE
Draft Date: 27 FEB 1975
Decaption Date: 01 JAN 1960
Decaption Note:
Disposition Action: RELEASED
Disposition Approved on Date:
Disposition Authority: GolinoFR
Disposition Case Number: n/a
Disposition Comment: 25 YEAR REVIEW
Disposition Date: 28 MAY 2004
Disposition Event:
Disposition History: n/a
Disposition Reason:
Disposition Remarks:
Document Number: 1975SANJO00851
Document Source: CORE
Document Unique ID: 00
Drafter: n/a
Enclosure: n/a
Executive Order: N/A
Errors: N/A
Film Number: D750071-0638
From: SAN JOSE
Handling Restrictions: n/a
Image Path:
ISecure: 1
Legacy Key: link1975/newtext/t1975027/aaaaafmh.tel
Line Count: 95
Locator: TEXT ON-LINE, ON MICROFILM
Office: ACTION L
Original Classification: LIMITED OFFICIAL USE
Original Handling Restrictions: n/a
Original Previous Classification: n/a
Original Previous Handling Restrictions: n/a
Page Count: 2
Previous Channel Indicators: n/a
Previous Classification: LIMITED OFFICIAL USE
Previous Handling Restrictions: n/a
Reference: 75 STATE 024007
Review Action: RELEASED, APPROVED
Review Authority: GolinoFR
Review Comment: n/a
Review Content Flags:
Review Date: 08 SEP 2003
Review Event:
Review Exemptions: n/a
Review History: RELEASED <08 SEP 2003 by ElyME>; APPROVED <09 SEP 2003 by GolinoFR>
Review Markings:

Margaret P. Grafeld
Declassified/Released
US Department of State
EO Systematic Review
05 JUL 2006

Review Media Identifier:
Review Referrals: n/a
Review Release Date: n/a
Review Release Event: n/a
Review Transfer Date:
Review Withdrawn Fields: n/a
Secure: OPEN
Status: NATIVE
Subject: CALVO CLAUSE AND RELATED PROVISIONS
TAGS: EINV, CS
To: STATE
Type: TE
Markings: Margaret P. Grafeld Declassified/Released US Department of State EO Systematic Review 05 JUL 2006